IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

1. STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
v.	)	Case No. 4:05-cv-00329-JOE-SAJ
1. TYSON FOODS, INC., 2. TYSON POULTRY, INC., 3. TYSON CHICKEN, INC., 4. COBB-VANTRESS, INC., 5. AVIAGEN, INC., 6. CAL-MAINE FOODS, INC., 7. CAL-MAINE FARMS, INC., 8. CARGILL, INC., 9. CARGILL TURKEY PRODUCTION, LLC, 10. GEORGE'S, INC., 11. GEORGE'S FARMS, INC., 12. PETERSON FARMS, INC., 13. SIMMONS FOODS, INC., and 14. WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO "PETERSON FARMS, INC.'S MOTION TO DISMISS AND, OR IN THE ALTERNATIVE, MOTION TO STAY PROCEEDINGS PENDING APPROPRIATE REGULATORY AGENCY ACTION"

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COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), by and through counsel, and respectfully submits that Defendant Peterson Farms, Inc.'s Motion to Dismiss and, or in the Alternative, Motion to Stay Proceedings Pending Appropriate Regulatory Agency Action" ("Peterson Motion") is not well-taken and should be denied.[1]

I. Introduction

The State has brought suit against the Poultry Integrator Defendants, including Defendant Peterson Farms, Inc. ("Defendant Peterson"), to hold them accountable for the past and continuing injury and damage to those portions of the Illinois River Watershed ("IRW") located in Oklahoma caused by the improper storage, handling and disposal of poultry waste at poultry operations for which they are legally responsible. This improper storage, handling and disposal of poultry waste has occurred, and continues to occur, both in Oklahoma and in Arkansas.

The State's First Amended Complaint ("FAC") describes in great detail the Illinois River Watershed, *see* FAC, ¶¶ 22-31, the Poultry Integrator Defendants' domination and control of the actions and activities of their respective growers, *see* FAC, ¶¶ 32-45, the Poultry Integrator Defendants' poultry waste generation, *see* FAC, ¶¶ 46-47, the Poultry Integrator Defendants' improper poultry waste disposal practices and their impact, *see* FAC, ¶¶ 48-64, and the reason for this lawsuit, *see* FAC, ¶¶ 65-69.

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[1] This Memorandum in Opposition is intended to respond not only to the Peterson Motion, but all of the other Poultry Integrator Defendants which have joined and / or adopted the Peterson Motion.

The basis of the Poultry Integrator Defendants' legal liability is set forth in the State's 10-count FAC. Count 1 asserts a cost recovery claim under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). *See* FAC, ¶¶ 70-77. Count 2 asserts a natural resource damages claim under CERCLA. *See* FAC, ¶¶ 78-89. Count 3 asserts a citizen suit claim under the Solid Waste Disposal Act ("SWDA"). *See* FAC, ¶¶ 90-97. Count 4 alleges that the Poultry Integrator Defendants' conduct "constitutes a private and public nuisance under applicable state law." *See* FAC, ¶¶ 98-108. Count 5 alleges that the Poultry Integrator Defendants' conduct "constitutes a nuisance under applicable federal law." *See* FAC, ¶¶ 109-18. Count 6 alleges that the Poultry Integrator Defendants' conduct "constitutes a trespass under applicable state law."[2] *See* FAC, ¶¶ 119-27. Count 7 alleges that the Poultry Integrator Defendants, "by and through their wrongful poultry waste disposal practices," have caused pollution of the land and waters within the IRW in Oklahoma in violation of 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1. *See* FAC, ¶¶ 128-32. Count 8 alleges that the Poultry Integrator Defendants, "by and through those [wrongful waste disposal] practices that occurred in Oklahoma," have caused releases of poultry waste to the waters of the IRW in Oklahoma in violation of the Oklahoma Registered Poultry Feeding Operations Act and its accompanying regulations. *See* FAC, ¶¶ 133-36. Count 9 alleges that the Poultry Integrator Defendants, "by and through those [wrongful waste disposal] practices that occurred in Oklahoma," have caused releases of poultry waste to the waters of the IRW in Oklahoma in violation of the regulations of the Oklahoma Concentrated Feeding Operation Act. *See* FAC, ¶¶ 137-39. And count 10 asserts

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[2] Thus, as regards counts 4 and 6, the FAC does not specify the jurisdiction of the common law it invokes or make a choice of law – although the State, at the appropriate time, will argue that it believes Oklahoma law applies to its common law claims as regards non-point source pollution irrespective of whether the source of the pollution is located in Oklahoma or Arkansas.

a claim against the Poultry Integrator Defendants for unjust enrichment / restitution / disgorgement. *See* FAC, ¶¶ 140-47.

The Peterson Motion seeks dismissal of (1) counts 4 through 10 of the FAC on the ground that the State's common law claims are allegedly precluded by Oklahoma's statutory program to regulate poultry waste; (2) counts 4 and 6 through 10 of the FAC on the ground that these claims seek to regulate conduct in Arkansas; (3) courts 4 through 6 and 10 on the ground that these claims are allegedly pre-empted by the Clean Water Act; (4) all of the State's claims on the ground that they are allegedly pre-empted by the Arkansas River Basin Compact; (5) count 3 of the FAC on the ground that the State allegedly failed to comply with the notice requirements of the SWDA; (6) count 7 of the FAC on the ground that land application of poultry waste allegedly cannot be nuisance *per se*; (7) all of the State's claims on the ground that the State is allegedly required to exhaust administrative remedies; and (8) counts 4 through 6 and 10 of the FAC on the ground that these claims are allegedly precluded under the political question doctrine. Further, the Peterson Motion seeks to have this action stayed pursuant to the doctrine of primary jurisdiction. As discussed below, none of these contentions has merit.

II. Legal Standard

The standard for analyzing a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is well established:

> [A]ll well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the nonmoving party. A 12(b)(6) motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted.

Sutton v. Utah State School for Deaf and Blind, 173 F.3d 1226, 1236 (10th Cir. 1999) (citations and quotations omitted).

"[T]he Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim. Granting defendant's motion to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Cottrell, Ltd. v. Biotrol International, Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999) (citations and quotations omitted). "The threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." *Robey v. Shapiro, Marianos & Cejda, LLC*, 340 F.Supp.2d 1062, 1064 (N.D. Okla. 2004) (citation and quotations omitted). "A motion to dismiss for failure to state a claim is viewed with disfavor, and is rarely granted." *Lone Star Industries, Inc. v. Horman Family Trust*, 960 F.2d 917 (10th Cir. 1992) (citation and quotations omitted).

III. Argument

A. The State's common-law claims are not precluded by Oklahoma's statutory and regulatory program

Defendant Peterson argues that Oklahoma's common law claims have been precluded by its statutory and regulatory program in that Oklahoma law permits land application of poultry waste. Peterson Motion, pp. 7-9. This contention is addressed thoroughly in the "State of Oklahoma's Memorandum in Opposition to 'Cobb Vantress, Inc.'s Motion to Dismiss Counts Four, Six, Seven, Eight, Nine and Ten of the First Amended Complaint or, Alternatively, to Stay the Action'" and, accordingly, as the State's response this Memorandum is hereby adopted and incorporated by reference. For the Court's convenience, however, the State does set forth a short summary of why Defendant Peterson's contentions are without merit.

In making its argument, Defendant Peterson simply ignores the fact that while Oklahoma law may under certain circumstances permit the land application of poultry waste, such land application must occur consistent with certain rules and regulations and in a manner such that, without limitation, there is no run-off and no adverse environmental impact. *See, e.g.,* 2 Okla. Stat. § 10-9.7(B)(1); 2 Okla. Stat. §10-9.7(B)(4); 2 Okla. Stat. § 20-10(B)(4); Okla. Admin. Code, § 35:17-3-14(b)(3)(A); Okla. Admin. Code, § 35:17-5-5(c). Plainly, therefore, nothing in the regulatory scheme pertaining to poultry waste "expressly authorizes" Defendant Peterson's improper poultry waste disposal practices – practices which are alleged in the FAC to have caused pollution of the IRW in Oklahoma. *See* FAC, ¶¶ 48-64 & ¶¶ 43-45.

Further, the mere fact that an activity is subject to regulation does not immunize an actor from common law liability. *See Sharp v. 251st Street Landfill, Inc.*, 810 P.2d 1270, 1274 fn. 4 (Okla. 1991), *overruled on other grounds*; *Briscoe v. Harper Oil Co.*, 702 P.2d 33, 37 (Okla. 1985); OUJI § 9.11. Indeed, it is established by statute in Oklahoma that the common law continues in force and effect in aid of Oklahoma's general statutes. 12 Okla. Stat. § 12; *see also Satellite Systems Inc. v. Birch Telecom of Oklahoma, Inc.*, 51 P.3d 585, 588 (Okla. 2002). No constitutional or statutory law, or Oklahoma judicial decision, explicitly, clearly, and plainly rebuts the presumption in favor of preservation of common law rights and expresses a legislative intent to eliminate Oklahoma's common law remedies for pollution. Consequently, Oklahoma's common law pollution remedies remain in full force.

B. Application of Oklahoma law to non-point source pollution[3] emanating from Arkansas and causing injury and damages in Oklahoma is appropriate

Defendant Peterson contends that application of Oklahoma law to non-point source pollution emanating from Arkansas and causing injury and damages in Oklahoma (1) violates the sovereignty of Arkansas, (2) violates the Due Process Clause, (3) violates the Commerce Clause, and (4) is pre-empted by the Clean Water Act. Each of these contentions is addressed thoroughly in the "State of Oklahoma's Memorandum in Opposition to 'Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint'" and, accordingly, as the State's response this Memorandum is hereby adopted and incorporated by reference. For the Court's convenience, however, the State does set forth short summaries of why Defendant Peterson's contentions are without merit.

1. Sovereignty contention

Defendant Peterson is without standing to raise alleged (and illusory) violations of the sovereignty of Arkansas. As explained by the Supreme Court, ". . . this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 95 S.Ct. 2197, 2205 (1975). In any event, "[t]he conflict with the sovereignty of the defendant's state is not a very significant factor in cases involving only U.S. citizens; conflicting policies between states are settled through choice of law analysis, not through loss of jurisdiction." *Brand v. Menlove Dodge*, 796 F.2d 1070, 1076, fn. 5 (9th Cir. 1986).

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[3] The difference between point sources and non-point sources is explained in "State of Oklahoma's Memorandum in Opposition to 'Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint.'"

2. Due Process Clause contention

Provided that Oklahoma has a significant contact or a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair – which it does – Oklahoma law may be applied to the Poultry Integrator Defendants consistent with the Due Process Clause. *Allstate Insurance Company v. Hague*, 101 S.Ct. 633, 640 (1981); *Philips Petroleum Company v. Shutts*, 105 S.Ct. 2965, 1978 (1985). Indeed, given that Oklahoma has a significant interest in the waters, lands and biota comprising those portions of the Illinois River Watershed in Oklahoma and that Oklahoma is suing for injury and damages to these waters, lands and biota, the application of Oklahoma law, pursuant to Oklahoma choice of law rules, is Constitutionally permissible.

3. Commerce Clause contention

While it is doubtful that the Commerce Clause even applies to lawsuits brought pursuant to state common law, *see, e.g., Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F.Supp.2d 245, 254 (D.N.J. 2000); *NAACP v. Acusport, Inc.* 271 F.Supp.2d 435, 464 (E.D.N.Y. 2003); *City of New York v. Beretta U.S.A. Corp.*, 315 F.Supp.2d 256, 285 (E.D.N.Y. 2004); *Crowley v. Cybersource Corp.*, 166 F.Supp.2d 1263, 1272 (N.D. Cal. 2001), even if it did, Defendant Peterson's contention that application of Oklahoma law violates the Commerce Clause fails under the *Pike v. Bruce Church Inc.*, 90 S.Ct. 844 (1970) test. Oklahoma law applies even-handedly to both Oklahoma and Arkansas polluters and would effectuate a legitimate local public interest. Finally, Defendant Peterson has come forward with no evidence that any burden that might be imposed on interstate commerce is clearly excessive in relation to the putative local benefits.

4. Clean Water Act pre-emption contention

The Supreme Court in *International Paper Co. v. Ouellette*, 107 S.Ct. 805 (1987), found that the CWA pre-empted affected-state common law as to out-of-state point source pollution on the ground that the CWA provided for a comprehensive, mandatory permitting scheme for the regulation of point source pollution. In contrast, inasmuch as it neither requires states to implement non-point source pollution regulatory programs, *see Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124-25 (10th Cir. 2005); *American Wildlands v. Browner*, 260 F.3d 1192, 1197 (10th Cir. 2001), nor authorizes the EPA to promulgate a federal program in the absence of an adequate state program, *American Wildlands*, 260 F.3d at 1197-98; *Defenders of Wildlife*, 415 F.3d at 1124, the CWA cannot be characterized as "sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation" as to non-point source pollution. *See International Paper*, 107 S.Ct. at 811(citation and quotations omitted). Accordingly, the CWA does not pre-empt the application of Oklahoma law to non-point source pollution emanating from Arkansas and causing injury and damage in Oklahoma.[4]

C. The Arkansas River Basin Compact does not pre-empt the State's claims

Defendant Peterson claims that the Arkansas River Basin Compact ("Compact") pre-empts[5] the State's claims in this case. Peterson Motion, p. 16.[6] Thus, Defendant Peterson would

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[4] Similarly, because the issue of non-point source pollution has not been "thoroughly addressed through the administrative scheme established by Congress [in the CWA]," *see City of Milwaukee v. Illinois*, 101 S.Ct. 1784, 1794 (1981), the federal common law of nuisance has not been displaced by the CWA as to this type of pollution.

[5] While Defendant Peterson takes the position here that the Compact pre-empts the State's claims, Defendant Peterson has apparently subsequently recognized that the State of Arkansas takes a rather different position: that the Compact merely presents an exhaustion of remedies issue with respect to the State's claims. *See* Defendants' Motion to Stay Proceedings and Integrated Opening Brief in Support and Request for Expedited Hearing (DKT #125) ("Stay Motion") (joined by Defendant Peterson). As stated in the Stay Motion, p. 4, ". . . Arkansas has

have the Court believe that this Compact, and the Commission it created, are the sole watchdogs of interstate water pollution. The text of the Compact, 82 Okla. Stat. § 1421, supports no such result.

At the outset, it should be noted that there is a presumption against finding pre-emption. *International Paper Co. v. Ouellette*, 107 S.Ct. 805, 811 (1987) ("courts should not lightly infer pre-emption"). Pre-emption may be found, however, "when federal legislation is 'sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation.'" *International Paper,* 107 S.Ct. at 811 (citation omitted). As pertains to the issue at hand, nothing in the Compact is "sufficiently comprehensive" as to the issue of pollution control to make reasonable the inference that there is no room left for supplementary state regulation.

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asked the Supreme Court . . . to declare that the Compact requires Oklahoma to present its grievances to the Compact Commission before seeking relief in district court, and to enjoin Oklahoma from prosecuting its pollution-related claims before this Court until it has exhausted its administrative remedies before the Compact Commission." (Emphasis added.) Defendant Peterson has thus staked out here a pre-emption position that neither the State of Oklahoma nor the State of Arkansas embraces. Needless to say, the State, of course, strongly disagrees with the Arkansas' position regarding the Compact that is set forth in Arkansas' Motion for Leave to File Bill of Complaint and Bill of Complaint ("Arkansas Motion"). Presentation of that disagreement, however, will be left to the State's forthcoming response to Arkansas' Motion. It will not be addressed in any detail here since the exhaustion of remedies issue was not raised by Defendant Peterson with respect to the Compact. *See* Peterson Motion, pp. 16-21.

[6] Defendant Peterson also asserts that the State's claims "constitute a breach of the compact." Peterson Motion, p. 16. Inasmuch as the Compact runs between the State of Oklahoma and State of Arkansas, Defendant Peterson is without standing to raise an alleged (and in this case non-existent) breach. *See Warth*, 95 S.Ct. at 2205 (". . . this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

Indeed, a plain reading of the Compact leads to precisely the opposite conclusion. Defendant Peterson has neglected to inform the Court that the Compact specifically endorses the use of state and federal pollution control laws by the State:

> The States of Arkansas and Oklahoma mutually agree to:
>
> * * *
>
> E. Utilize the provisions of all federal and state water pollution laws and to recognize such water quality standards as may be now or hereafter established under the Federal Water Pollution Control Act in the resolution of any pollution problems affecting the waters of the Arkansas River Basin.

82 Okla. Stat. § 1421 (Art. VII(E)). So, rather than pre-empting other federal and state water pollution laws, the Compact itself explicitly endorses their use. This endorsement of the use of other federal and state law in 82 Okla. Stat. § 1421 (Art. VII(E)) is entirely consistent with the pertinent stated purpose of the Compact, namely "[t]o encourage the maintenance of an active pollution abatement program in each of the two states and to seek the further reduction of both natural and man-made pollution in the waters of the Arkansas River Basin." 82 Okla. Stat. § 1421 (Art. I(D)) (emphasis added).[7]

Moreover, in addition to confirming and encouraging the State's right to utilize the provisions of all federal and state water pollution laws, the Compact also expressly disclaims any requirement that the State proceed before the Commission before asserting its rights in court:

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[7] The use of the term "to encourage" reflects that this purpose of the Compact is aspirational and hortatory rather than mandatory. A comparison with the language of those portions of the Compact dealing with water apportionment clearly indicates that the authors of the Compact knew how to draft mandatory language when they wanted to. *See, e.g.*, 82 Okla. Stat. § 1421 (Art. I(B) & (C)) ("to provide"). Aspirational or hortatory language is hardly indicative of a pre-emptive intent. *See, e.g., Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990) (aspirational and general language insufficient to justify a finding of pre-emption).

> . . . The making of findings, recommendations, or reports by the Commission shall not be a condition precedent to instituting or maintaining any action or proceeding of any kind by a signatory state in any court, or before any tribunal, agency or officer, for the protection of any right under this Compact or for the enforcement of any of its provision[.]

82 Okla. Stat. § 1421 (Art. IX(A)(8)) (emphasis added). Reading 82 Okla. Stat. § 1421 (Art. VII(E)) together with this section, there can be no valid contention that the Compact is the exclusive means to combat pollution or that action before the Commission is a condition precedent to seeking relief in this Court.

Further underscoring this fact is the statement in the Compact that "[f]indings of fact made by the Commission shall be admissible in evidence and shall constitute prima facie evidence of such fact in any court . . . ." 82 Okla. Stat. § 1421 (Art. IX(A)(8)) (emphasis added). Obviously, were resort to the Commission a party's sole or primary recourse, there would be no need for this provision.[8]

Finally, the limited scope of the Commission's powers is revealed by an overstatement in the Peterson Motion. Inexplicably citing to a draft of the Compact, Defendant Peterson contends that "[t]he ARBC also contemplates that the ARBC Commission could issue injunctive orders as part of its enforcement arsenal." Peterson Motion, pp. 18-9. The actual final text of the Compact omits the word "injunctive," *see* 82 Okla. Stat. § 1421 (Art. IX(A)(7)), thus leading to the conclusion that the Commission does not have such authority. Indeed, the Compact now merely provides that the Commission may "issu[e] such appropriate orders as it deems necessary for the proper administration of this Compact . . . ." 82 Okla. Stat. § 1421 (Art. IX(A)(7)).

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[8] Notably, the Compact does not give the Commission jurisdiction to enter judgments against non-party polluters, to award damages against non-party polluters or to force non-party polluters to abate pollution.

Rather than creating an irreconcilable conflict with any other statutory remedy asserted by the State or expressing any intention to abrogate any common law remedy asserted in this suit, the Compact encourages and endorses the use of other pollution remedies. Likewise, nothing in the compact evidences any intention to so completely take over the role of protecting the public from water pollution that the Court can assume that Congress intended the Compact to be the sole vehicle for interstate water pollution control in the Arkansas River Basin. Accordingly, the Compact pre-empts no portion of this case.

D. The State has standing to bring a RCRA claim, and, further, its RCRA notice letter was proper

Defendant Peterson contends that Count 3 of the State's FAC should be dismissed on the ground that the State has failed to comply with the applicable pre-filing RCRA notice requirements, and that in any event the State is an improper party to bring the RCRA claim. In support of these contentions, Defendant Peterson adopts Tyson Poultry, Inc.'s Motion to Dismiss Count 3 of Plaintiffs' First Amended Complaint. Both of Defendant Peterson's contentions are thoroughly addressed in the "State of Oklahoma's Memorandum in Opposition to 'Defendant Tyson Poultry, Inc.'s Motion to Dismiss Count 3 of Plaintiffs' First Amended Complaint" and, accordingly, as the State's response this Memorandum is hereby adopted and incorporated by reference. For the Court's convenience, however, the State does set forth short summaries of why Defendant Peterson's contentions are without merit.

1. Compliance with pre-filing RCRA notice requirements

There is no dispute that the State's RCRA notice was sent to all the statutorily-required persons. The contention that the State's failure to comply with the allegedly accompanying administrative regulations dealing with notice warrants dismissal under *Hallstrom v. Tillamook County*, 110 S.Ct. 304, 312 (1989), is wrong on two levels. First, the administrative regulations

cited do not pertain to the type of RCRA action being brought by the State. And even if they were to apply, dismissal is simply not supported by the caselaw. *See, e.g., Two Rivers Terminal, L.P. v. Chevron USA, Inc.*, 96 F.Supp.2d 426, 432 (M.D. Pa. 2002); *College Park Holdings, LLC v. Racetrac Petroleum, Inc.*, 239 F.Supp.2d 1322, 1332 (N.D. Ga. 2002). Likewise, a review of the State's RCRA notice letter demonstrates that it fully complies with the requirement under 42 U.S.C. § 6972(b) in that it "give[s] notice of the endangerment."

2. State standing to bring RCRA claim

By the plain language of the statute, *see* 42 U.S.C. §§ 6972(a)(1)(B) & 6903(15), as well by unequivocal statement by the Supreme Court, it is clear that RCRA allows a state to bring a citizen suit. *See United States Department of Energy v. Ohio,* 112 S.Ct. 1627, 1634 (1992).

E. Dismissal of the State's claims sounding in nuisance *per se* is not warranted

In section II.D. of its motion, Defendant Peterson argues that the State's claims sounding in nuisance *per se* should be dismissed on the ground that the State cannot establish that land application of poultry waste is, under all circumstances, a nuisance.[9] Peterson Motion, pp. 21-22. Defendant Peterson, however, has misunderstood the State's allegations. The State alleges that the Poultry Integrator Defendants' poultry waste handling practices that cause pollution are a nuisance under all circumstances and thus constitute a nuisance *per se*.

The Oklahoma Supreme Court has explained the difference between a nuisance *per se* and a nuisance *per accidens* thusly:

> [A] nuisance *per se* is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. The number of things which are nuisances per se is limited, and by far the larger class

[9] The heading of section II.D. is apparently in error inasmuch as the State's nuisance *per se* allegations appear in Count 4 of the FAC, ¶¶ 103-04, and not in Count 7.

> of nuisances is that which may be termed nuisances in fact or nuisances *per accidens*, and consists of those acts, occupations or structures which are not nuisances *per se* but may become nuisances by reason of the circumstances or the location and surroundings.

McPherson v. First Presbyterian Church of Woodward, 248 P. 561, 564 (Okla. 1926) (quotations and citation omitted).

27A Okla. Stat. §2-6-105(A) states that "[i]t shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state. Any such action is hereby declared to be a public nuisance." 2 Okla. Stat. § 2-18.1(A) states that: "[i]t shall be unlawful and a violation of the Oklahoma Agricultural Code for any person to cause pollution of any air, land or waters of the state by persons which are subject to the jurisdiction of the Oklahoma Department of Agricultural, Food, and Forestry pursuant to the Oklahoma Environmental Quality Act." These general statutes are reinforced by a number of other statutes and regulations pertaining directly to the land application of poultry waste, and underscore that under Oklahoma law poultry waste handling practices that cause pollution are prohibited. *See, e.g.*, 2 Okla. Stat. § 10-9.7(B)(1) ("There shall be no discharge of poultry waste to waters of the state"); 2 Okla. Stat. §10-9.7(B)(4) ("Poultry waste handling, treatment, management and removal shall: (a) not create an environmental or public health hazard, (b) not result in the contamination of waters of the state . . ."); 2 Okla. Stat. § 20-10(B)(4) ("Animal waste handling, treatment, management and removal shall: (a) not create an environmental or public health hazard"); Okla. Admin. Code, § 35:17-3-14(b)(3)(A) ("Runoff from animal waste is prohibited where it results in a discharge to surface or groundwaters of the State"); Okla. Admin. Code, § 35:17-5-5(c) ("Storage and land application of poultry waste shall not cause a discharge or runoff

of significant pollutants to waters of the State or cause a water quality violation to waters of the State").

Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982), provides that "[w]hen the conditions giving rise to a nuisance are also a violation of a statutory prohibition, those conditions constitute a nuisance *per se*, and the issue of the reasonableness of the defendant's conduct and the weighing of the relative interests of the plaintiff and defendant is precluded because the Legislature has, in effect, already struck the balance in favor of the innocent party." Quite plainly, then, poultry waste handling practices that cause pollution are a nuisance under all circumstances. Accordingly, in such circumstances, a claim for nuisance *per se* can plainly be made out under 27A Okla. Stat. §2-6-105(A) and 2 Okla. Stat. § 2-18.1(A).[10 & 11]

F. The State of Oklahoma need not exhaust administrative remedies before bringing this action.

Defendant Peterson suggests Oklahoma's claims should be dismissed for an alleged failure to exhaust administrative remedies. Peterson Motion, p. 22. This contention is addressed thoroughly in the "State of Oklahoma's Memorandum in Opposition to 'Cobb Vantress, Inc.'s Motion to Dismiss Counts Four, Six, Seven, Eight, Nine and Ten of the First Amended Complaint or, Alternatively, to Stay the Action'" and, accordingly, as the State's response this Memorandum is hereby adopted and incorporated by reference. For the convenience of the

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[10] The Court's ruling in *City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263, 1290-93 (N.D. Okla. 2003), *vacated in connection with settlement*, is distinguishable from the present question facing the Court. In *City of Tulsa*, the issue of nuisance *per se* was before the Court on plaintiff's motion for summary judgment. In contrast, here the issue of nuisance *[er se* is before the Court on whether the State has stated a claim. The standards to be applied to a Fed. R. Civ. P. 12(b)(6) and a Fed. R. Civ. P. 56 are obviously very different.

[11] In any event, even if the Court were to disagree, the State's nuisance claims under counts 4 and 7 of the FAC would survive with respect to nuisance *per accidens* theories.

Court, the State makes the following summary of why no exhaustion of remedies is necessary in the present case.

To so contend, Defendant Peterson must ignore the fact that the express language of the various statutes at issue provides for direct enforcement in the courts by the Attorney General. *See* 2 Okla. Stat. § 10-9.11; 27A Okla. Stat. § 2-3-504; 2 Okla. Stat. § 20-26; 2 Okla. Stat. § 2-16. Where the plain language of a statute contains no exhaustion requirement and "where the language of a statute is plain and unambiguous, . . . the statute will be accorded the meaning as expressed by the language therein employed." *Ladd Petroleum Corp v. Oklahoma Tax Commission,* 767 P.2d 879, 882 (Okla. 1989) (direct recourse to district court allowed by statute, no need to exhaust remedies before the Tax Commission). *Accord Daugherty v. U.S.*, 212 F.Supp.2d 1279, 1288 (N.D. Okla. 2002), citing *Darby v. Cisneros*, 509 U.S. 136, 154, 113 S.Ct. 2539, 125 L.Ed.2d 113 (1993).

Defendant Peterson must also ignore the fact that the exhaustion of administrative remedies doctrine does not apply when the government is the party bringing suit. *See, e.g., United States v. Tenet Healthcare Corp.*, 343 F.Supp.2d 922, 934 (C.D. Cal. 2004) (stating in Medicare overpayments recovery action that "[w]here, as here, the government itself 'decides to pursue a judicial remedy, the exhaustion of remedies doctrine is simply not applicable'") (citation omitted). Simply put, the exhaustion of remedies doctrine is inapplicable.

G. The Political Question Doctrine does not apply to this action.

Defendant Peterson contends this Court should dismiss the State's common law claims pursuant to the political question doctrine. This contention is addressed thoroughly in the "State of Oklahoma's Memorandum in Opposition to 'Tyson Chicken, Inc.'s Motion to Dismiss Counts 4, 5, 6 and 10 of the First Amended Complaint Under the Political Question Doctrine'" and,

accordingly, as the State's response, this memorandum is hereby adopted and incorporated by reference.[12] For the convenience of the Court, the State makes the following summary of why the political question doctrine does not apply in this case.

Courts routinely handle claims involving claims of nuisance, trespass and unjust enrichment in the pollution context. *See, e.g., Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 496 (1971) (noting the justiciability of controversies "between a State and citizens of another state seeking to abate a nuisance that exists in one State yet produces noxious consequences in another," but ultimately denying Ohio's motion for leave to file complaint in Supreme Court without prejudice to its right to commence other appropriate judicial proceedings). Indeed, as previously noted, quite recently this Court was called upon to adjudicate a case against the poultry industry asserting many claims similar to the ones being asserted here. *See City of Tulsa v. Tyson Foods, Inc.*, Case No. 01-CV-0900-B(C), N.D. Okla. Common law nuisance, trespass and unjust enrichment claims have been decided by courts for centuries, and their contours are well known. Thus, truly common law remedies do not require the Court to intrude in areas committed by the Constitution to political branches or to make initial policy decisions requiring nonjudicial discretion. Consequently, the political question doctrine does not bar the common law claims advanced by the State.

H. No agency has primary jurisdiction over these claims, and the Court should not defer to any nonexistent administrative proceedings

Defendant Peterson argues that primary jurisdiction of the State's claims brought pursuant to agricultural and environmental statutes or Oklahoma common law lies with the

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[12] In contrast to Defendant Tyson Chicken, Defendant Peterson has moved for dismissal on this ground pursuant to Fed. R. Civ. P. 12(b)(6) rather than Fed. R. Civ. P. 12(b)(1).

ODAFF.[13] Defendant Peterson's argument is without merit. The State addresses the thrust of this contention thoroughly in the "State of Oklahoma's Memorandum in Opposition to 'Cobb Vantress, Inc.'s Motion to Dismiss Counts Four, Six, Seven, Eight, Nine and Ten of the First Amended Complaint or, Alternatively, to Stay the Action.'" Accordingly, in addition to the arguments below and in response, this Memorandum is hereby adopted and incorporated by reference. For the convenience of the Court, the State makes the following summary of why the Court's exercise of abstention to hear these claims based on the primary jurisdiction doctrine is not appropriate in the present case.

First, the Oklahoma Legislature has created separate and distinct parallel enforcement mechanisms for those provisions of the agriculture and environmental statutes at issue in this case. *See* 2 Okla. Stat. § 10-9.11; 27A Okla. Stat. § 2-3-504; 2 Okla. Stat. § 20-26; 2 Okla. Stat. § 2-16. Specifically, enforcement actions on behalf of the State may be brought directly in court by either the Attorney General, a district attorney or the applicable agency under the same statutes and regulations giving such agency administrative authority over poultry waste pollution.

Second, it is indisputable that the factual issues in this case are well within the usual competency of courts to decide. Indeed, as previously noted, this Court was quite recently called upon to handle a case, *City of Tulsa v. Tyson Foods, Inc.*, against the poultry industry that asserted many claims similar to the ones being asserted here.

Third, Defendant Peterson has made no showing that the regulatory agencies have subjected them to any orders whatsoever which might potentially conflict with the remedial

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[13] There can be no argument whatsoever that the State's claims under CERCLA and RCRA are subject to stay pursuant to the alleged primary jurisdiction of a state agency. CERCLA and RCRA are federal statutory schemes which provide for federal causes of action. These statutory schemes and causes of action do not depend upon any prior state agency determinations.

orders which the Court should issue. Indeed, Defendant Peterson points to no ongoing regulatory action by the ODAFF covering the subject matter of this suit to which the Court could defer, and indeed there is none.

In addition, the Peterson Motion substantively differs from that of Defendant Cobb-Vantress in that (1) it claims that a factual finding by the Executive Director of the ODEQ under Subparagraph B of Section 2-6-105 is required before liability may attach under Subparagraph A, and (2) it argues that the Clean Water Act preempts the State's claims and dictates that primary jurisdiction of those claims lies with various regulatory agencies.

In arguing that the Executive Director of the ODEQ must make a factual finding regarding pollution under Subparagraph B of Section 2-6-105 before liability may attach under Subparagraph A, Defendant Peterson relies upon *Burlington Northern & Santa Fe Railroad Co. v. Spin-Galv*, No. 03-CV-162-P(J), at 7-8 (N.D. Okla. Oct. 5, 2004) (unpublished), *appeal docketed*, No. 04-5182 (10th Cir. Nov. 26, 2004). However, the *Burlington Northern* decision is not controlling in the instant action because it does not address an earlier decision by the Oklahoma Court of Appeals which addresses the interpretation of this very statute. *See N.C. Corff Partnership, Ltd. v. Oxy USA, Inc.*, 929 P.2d 288 (Okla. App. 1996), *cert. denied* (1996).[14]

In *N.C. Corff*, the defendant argued that the plaintiffs "could not prove public nuisance because they relied on the definition of 'public nuisance' found in Oklahoma's Water Pollution Control Act (OWPCA), 82 O.S. 1991 § 926.4(A) (amended and renumbered at 27A O.S. Supp.

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[14] Indeed, as addressed in footnote 5 of the *Burlington Northern* decision, Plaintiff in that case asserted no caselaw supporting its position that the two subsections of 27A Okla. Stat. § 2-6-105 should be read independently. Perhaps the below-noted mis-citation to 27A Okla. Stat. § 2-6-105 caused it to get lost in the shuffle, and thus Plaintiff failed to cite *N.C. Corff*.

1995 § 2-6-501(A) [sic][15], which deems pollution of the 'waters of the state' to be a 'public nuisance.'" *N.C. Corff*, 929 P.2d at 295. The defendant contended instead that the appropriate definition of "public nuisance" is found in 50 Okla. Stat. § 2 defining a "public nuisance" as "one which affects at the same time an entire community or neighborhood." *N.C. Corff*, 929 P.2d at 295. The Oklahoma Court of Appeals did not find a conflict between the language of 50 Okla. Stat. § 2 and the language of 82 Okla. Stat. § 926.4(A), and found that the OWPCA clearly deems water pollution to be a "menace to public health and welfare," and declares Oklahoma's public policy to be one of antidegradation of the state's waters. *N.C. Corff*, 929 P.2d at 295. Therefore, section 27A Okla. Stat. § 2-6-105(A) (as amended and renumbered) "simply carries the intent of the Oklahoma Legislature into effect, by declaring any pollution of state waters to be of such consequence, in and of itself, as to 'affect at the same time an entire community or neighborhood.'" *N.C. Corff*, 929 P.2d at 295. This Oklahoma Court of Appeals case thus stands for the proposition that § 2-6-105(A) is effectuating the long-standing policy of Oklahoma and is to be read independent of § 2-6-105(B). Therefore, Defendant Peterson's argument that a factual finding is required by the ODEQ is without merit.

Defendant Peterson also suggests that the Clean Water Act requires that the Court defer to the primary jurisdiction of the regulatory agencies. As discussed above in Section III.B.4., the CWA does not pre-empt the application of Oklahoma law to non-point source pollution emanating from Arkansas and causing injury and damage in Oklahoma and, therefore, does not

[15] A review of the statute cited reveals that this is a typographical error. The appropriate citation is 27A Okla. Stat. § 2-6-105(A).

confer primary jurisdiction on any regulatory body.[16] Further, it should be noted that while the Oklahoma Department of Environmental Quality has been delegated regulatory jurisdiction over certain CWA matters, *see* 27A Okla. Stat. § 1-3-101(B), it has not been delegated regulatory jurisdiction with respect to "point source discharges and nonpoint runoff from agricultural crop production, agricultural services, livestock production, silviculture, feed yards, livestock markets and animal waste." 27A Okla. Stat. § 1-3-101(D). Regulatory jurisdiction over pollution from such agricultural activities has been delegated to the Oklahoma Department of Agriculture, Food, and Forestry. 27A Okla. Stat. § 1-3-101(D). Thus, the contention that one of these agencies has primary jurisdiction over the matters pertaining to the CWA that are raised in this litigation is without basis. The regulatory scheme in Oklahoma effectuating provisions of the CWA does not supplant any other statutory remedy or invalidate any common law remedy available to the State. In fact, this regulatory scheme in Oklahoma effectuating provisions of the CWA are but a portion of the larger effort to combat pollution in Oklahoma. This lawsuit is not an effort to supersede or interfere with the formulation or implementation of a coherent water policy. Rather Oklahoma's water policy is already set forth as:

> Whereas the pollution of the waters of this state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life, and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, and whereas the problem of water pollution of this state is closely related to the problem of water pollution in adjoining states, it is hereby declared to be the public policy of this state to conserve the waters of the state and to protect, maintain and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses; to provide that no waste or pollutant be discharged into any waters of the state or otherwise placed in a location likely to affect such waters without first being given the degree of treatment or taking such other measures as necessary to

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[16] With regards to point source pollution, "nothing in the [CWA] bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source state." *International Paper,* 107 S.Ct. at 814.

> protect the legitimate beneficial uses of such waters; to provide for the prevention, abatement and control of new or existing water pollution; and to cooperate with other agencies of this state, agencies of other states and the federal government in carrying out these objectives.

27A Okla. Stat. § 2-6-102. *See also* 82 Okla. Stat. 1084.1. Throughout the environmental statutes are provisions which direct or allow the Attorney General to carry this policy into effect by taking action against individuals who are causing pollution. Thus, this regulatory jurisdiction in no way limits the State's authority to proceed directly to court to address the pollution of the IRW.

Solving the pollution problem caused by Poultry Integrator Defendants' poultry waste is simply not one that is committed solely to administrative agencies. *See, e.g., Meinders v. Johnson*, Okla. App., Nov. 2, 2005 Slip Opinion, p. 21 ("To read the cited sections as depriving the district court of its 'unlimited original jurisdiction of all justiciable matters' raises some substantial constitutional questions, and, absent a clearer expression of the Legislature's intent to divest the district court of its general jurisdiction, we must adopt a construction of the cited sections which frees them of constitutional infirmity"; finding Oklahoma Corporation Commission did not have exclusive jurisdiction over pollution matter). Further, these administrative agencies simply lack the ability to provide the range of remedies necessary to address the problem and uniformly clean up those portions of the IRW in Oklahoma. For example, in contrast to the administrative agencies, this Court can properly determine the compensatory and punitive damages to which the State is entitled and can issue remedial orders to abate the nuisance and enjoin the trespass. Accordingly, given the magnitude of the pollution problem caused by Poultry Integrator Defendants' improper poultry waste disposal practices, rather than deferring to the administrative process, the State has elected – as is its right – to

proceed in this Court. This election to proceed in this Court is appropriate under the law and should not be abridged.

IV. Conclusion

WHEREFORE, premises considered, the Peterson Motion should be denied.

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